

ORIGINAL

No. 87-5620

Supreme Court, U.S.
FILED
NOV 30 1987
JOSEPH F. SPANIOLO, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

PERRY HOO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether petitioner was entitled to dismissal of the indictment because of pre-indictment delay.

(1)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. 87-5620

PERRY HOO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 825 F.2d 667. The oral opinion of the district court (Pet. App. 16a-23a) denying petitioner's motion to dismiss the indictment is not reported. The opinion of the district court (id. at 11a-15a) ordering a hearing to determine whether the indictment should be dismissed is reported at 632 F.Supp. 1336.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1987. The petition for a writ of certiorari was filed on October 2, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following his entry of a conditional plea of guilty in the United States District Court for the Southern District of New York, petitioner was convicted of a substantive RICO offense and of RICO conspiracy, in violation of 18 U.S.C. 1962(c) and (d). He was sentenced to five and one-half years' imprisonment and three years' probation. The court of appeals affirmed (Pet. App. 1a-10a).

1. Petitioner was a member of the "Ghost Shadows" youth gang that terrorized New York City's Chinatown from 1971 until October 1982. As a member of the gang, petitioner extorted money, goods, and services from various Chinatown businesses, operated illegal gambling businesses, killed or tried to kill rival gang members, and committed robbery. Petitioner was between 14 and 18 years of age when he committed his crimes. Pet. App. 3a.

The government filed the indictment against petitioner on December 27, 1984, which was 13 days after petitioner's 21st birthday. Petitioner filed a pretrial motion to dismiss the indictment on the ground, among others, that the delay in filing the indictment caused petitioner the loss of his rights under the Juvenile Delinquency Act, 18 U.S.C. 5031 et seq.^{1/} The district court ordered a hearing on the motion.

Special Assistant United States Attorney Nancy Ryan, who had primary responsibility for the prosecution of the case against Ghost Shadows members, was the sole witness at the hearing. She testified that the federal investigation into the Ghost Shadows took place between April 1982 and December 27, 1984. The investigators initially focused on the gang's leaders, developing cases against them and seeking their cooperation. The investigators interviewed civilian witnesses and members of rival gangs and reviewed law enforcement agencies' intelligence

^{1/} The Juvenile Delinquency Act provides special procedural and substantive rights for juveniles accused of criminal acts. An individual indicted after his 21st birthday is not eligible for treatment under the Act, even if his offenses were committed prior to his 18th birthday. See Pet. App. 6a-7a. Where the Act applies, the government may not prosecute the juvenile in federal district court absent a specified certification by the Attorney General concerning the state's inability or unwillingness to assume legal responsibility for the juvenile and the violent or drug-regulated character of the crime. If the juvenile is prosecuted under the Act, he faces substantially lower penalties than if he were prosecuted as an adult. Even if a juvenile is eligible for treatment under the Act, he may in certain circumstances nonetheless be tried as an adult (18 U.S.C. 5302). See generally Pet. App. 5a n.1; *United States v. Frasquillo-Zomosa*, 626 F.2d 99 (9th Cir.), cert. denied, 449 U.S. 987 (1980).

files. See Pet. App. 4a; C.A. App. 40-42.

From January through December 27, 1984, the government presented evidence to a federal grand jury. In addition to the crimes ultimately charged in the indictment, the government presented evidence of other offenses committed by Ghost Shadows members. During this period, Ryan prosecuted other cases against Chinatown youth gangs. Pet. App. 4a, 17a; C.A. App. 42-45.

The government was aware of petitioner's crimes at the outset of its investigation. Not until December 13, 1984, however, did the government obtain critical evidence against petitioner needed to prove petitioner's participation in the murder of Puk Chui (Racketeering Act No. 29). On that day, which was one day before petitioner's 21st birthday, a criminal defendant signed a cooperation agreement with the government and testified before the grand jury about the Chui murder, providing what the government considered "the most important evidence" against petitioner (Pet. App. 4a). See *id.* at 4a, 17a, 19a.

To avoid statute-of-limitations problems concerning crimes committed by petitioner's associates, the government worked to complete the indictment process by the end of December 1984. The indictment -- which was 90 pages long, contained 12 counts, named 25 defendants, and charged 89 racketeering acts, of which 7 involved petitioner -- went through 10 drafts. The government also prepared 10 drafts of a 120-page prosecution memorandum needed to obtain Department of Justice approval for the indictment. The grand jury was convened on December 27, a day that it did not normally sit, and it handed down the indictment that day. Pet. App. 19a; C.A. App. 44, 50.

In October 1984, Ryan discussed with other federal prosecutors the possible effect of the Juvenile Delinquency Act on the racketeering prosecution. Ryan, however, did not realize the date of petitioner's 21st birthday until at least December 19, five days after the birthday. Ryan was unaware of any governmental attempt to delay the filing of the indictment in

order to obtain a legal advantage over petitioner and was also unaware of any reason why petitioner's defense was impaired by the filing of the indictment in December 1984. Pet. App. 4a, 19a-20a; C.A. App. 48-50, 69.

2. The district court denied the motion to dismiss the indictment (Pet. App. 23a). The court first concluded that petitioner was prejudiced by the filing of the indictment after he had reached his 21st birthday, because he thereby lost the chance for treatment under the Juvenile Delinquency Act (Pet. App. 21a). The court held, however, that the government had a satisfactory reason for its delay in filing the indictment.

The court found that the government had not considered petitioner's juvenile status at all in deciding when to seek an indictment and reasoned that it had no special obligation to consider such status (*id.* at 22a). The court found that the government had engaged in "entirely appropriate investigatory conduct" (*ibid.*). It found that the filing of the indictment after petitioner's 21st birthday "was not aimed at [petitioner] in any way" (*ibid.*), but, rather, was the result of a "combination of other responsibilities * * * and the difficulties working out the final arrangements with the cooperating witness" (*id.* at 22a-23a). While observing that an earlier indictment would have been possible, the court pointed out that filing prior to petitioner's birthday "would have changed the entire structure of the indictment, and the process would have required sealing [of indictments] and a whole host of different elements" (*id.* at 23a) and "the evidence would have been of a different quality" (*id.* at 20a). The court therefore concluded that the motion to dismiss the indictment must be denied, whether under a standard allowing dismissal only for improper governmental purpose or under a standard requiring a balancing of the government's interests against the prejudice to the defendant (*ibid.*).

3. The court of appeals affirmed (Pet. App. 1a-10a). It rejected all of petitioner's claims, including the argument that

his due process rights had been violated by the delay in the filing of the indictment. The court reasoned that petitioner failed to show that the "government had improperly delayed his prosecution in order to gain a tactical advantage" (*id.* at 10a). It observed that petitioner did not challenge the district court's finding that the government was not seeking a tactical advantage against petitioner, because the government had simply given no thought to the effect of the calendar on petitioner's rights under the Act until after his 21st birthday (*ibid.*). The court of appeals agreed with the district court that the timing of the indictment was due to the "need to obtain evidence and the difficulties that necessarily arise in a complex RICO investigation" (*ibid.*).

ARGUMENT

Petitioner contends (Pet. 11-19) that the Due Process Clause of the Fifth Amendment requires dismissal of the indictment against him because of prejudicial delay. He argues that there is a conflict among the circuits on the standard for review of claims of prejudicial pre-indictment delay. Petitioner clearly is not entitled to relief, however, and the inter-circuit differences in approach do not warrant this Court's review.

1. As this Court stated in *United States v. Lovasco*, 431 U.S. 783, 789 (1977), in addition to the protection afforded by the applicable statute of limitations, the Due Process Clause "has a limited role to play in protecting against oppressive delay" in the filing of an indictment. That limited constitutional protection, the Court ruled (*id.* at 789-790), is available only when a two-pronged test is satisfied. The defendant must actually have been prejudiced by the delay, and the government's reasons for the delay must be such as to make compelling the defendant to stand trial a violation of "those fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency" (*id.* at 790 (citations and

internal quotation marks omitted)). The Court then held that, while the second prong of that test could be satisfied where the government sought "'to gain tactical advantage over the accused'" (*id.* at 795 (quoting *United States v. Marion*, 404 U.S. 307, 324 (1971))), it is not satisfied by investigative delay -- *i.e.*, fundamental conceptions of justice are not offended when the delay is due to the government's continued criminal investigation, even if sufficient evidence has been assembled and even if the continued investigation focuses not on the defendant himself but on other participants in related criminal transactions (431 U.S. at 791-796). Such "investigative delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused'" (*Lovasco*, 431 U.S. at 795 (citation omitted)).

The courts of appeals have adopted roughly two approaches in applying the *Lovasco* standard. Thus, some courts have stated that relief is available only if the defendant is prejudiced and the government intended to delay the institution of proceedings in order to obtain a tactical advantage over the defendant. *E.g.*, *United States v. Ismaili*, 828 F.2d 153, 166 (3d Cir. 1987); *United States v. Lebron-Gonzalez*, 816 F.2d 823, 831 (1st Cir. 1987); *United States v. Caporale*, 806 F.2d 1487, 1514 (11th Cir. 1986), cert. denied, Nos. 86-6576 and 86-1713 (June 8 & 26, 1987); *United States v. Jenkins*, 701 F.2d 850, 854 (10th Cir. 1983). That reading of *Lovasco* is in accord with this Court's description of the standard for Fifth Amendment relief from pre-indictment delay in *United States v. Gouveia*, 467 U.S. 180, 192 (1984).^{2/} As petitioner notes (Pet. 13-15), other courts of

^{2/} The *Gouveia* Court stated (467 U.S. at 192 (footnote omitted)) that, beyond the protection against pre-indictment delay furnished by the applicable statute of limitations, "the Fifth Amendment requires the dismissal of an indictment, even if it is brought within the statute of limitations, if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense. *United States v. Lovasco*, *supra*, at 789-790; *United States v. Marion*, (cont'd on next page)

appeals have articulated various versions of seemingly more relaxed approaches to applying *Lovasco*. Those courts have not required an intentional seeking of tactical advantage, but have suggested that less reprehensible governmental reasons for delay, assessed in light of the prejudice caused by the delay, might be sufficient to establish the violation of fundamental conceptions of justice that *Lovasco* demands. See, *e.g.*, *United States v. Valentine*, 783 F.2d 1413, 1416 (9th Cir. 1986); *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 403-404 (4th Cir. 1985); *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985), cert. denied, 474 U.S. 1102 (1986).^{3/}

2. Notwithstanding the differences in approach, further review in this case is not warranted for two reasons. First, it is clear that petitioner's claim to relief was properly denied under either of the two approaches to applying *Lovasco*. Not even petitioner contends that he could prevail under the more stringent standard: as he has conceded in this Court (Pet. 5 n.*) and in the court of appeals (see Pet. App. 10a), the delay in this case was not the result of any conscious decision by the government to seek an advantage over petitioner. Contrary to his argument, however (Pet. 16-19), petitioner likewise could not prevail under the somewhat more relaxed approaches to judging claims of unconstitutional pre-indictment delay.

Even the circuits that have not required intentional seeking of tactical advantage to establish a constitutional violation

supra, at 324."

^{3/} The Fifth, Seventh, and Eighth Circuits have been inconsistent in their approaches. Some decisions have required intentional seeking of tactical advantage or similar advantage-seeking conduct or impermissible reasons. *E.g.*, *United States v. Scott*, 795 F.2d 1245 (5th Cir. 1986); *United States v. Watkins*, 709 F.2d 475 (7th Cir. 1983); *United States v. Bartlett*, 794 F.2d 1285, 1293 (8th Cir. 1985), cert. denied, No. 86-5392 (Nov. 3, 1986). Other decisions have articulated more flexible approaches. *E.g.*, *United States v. Townley*, 665 F.2d 579 (5th Cir.), cert. denied, 456 U.S. 1010 (1982); *United States v. Solomon*, 688 F.2d 1171 (7th Cir. 1982); *United States v. Taylor*, 603 F.2d 732 (8th Cir.), cert. denied, 444 U.S. 982 (1979). See *Dickerson v. Louisiana*, 816 F.2d 220, 229 n.16 (5th Cir. 1987); *United States v. Hollins*, 811 F.2d 384, 387-388 (7th Cir. 1987).

recognize that an investigative delay is not the sort of pre-indictment delay that offends fundamental notions of due process. See, e.g., United States v. Automated Medical Laboratories, 770 F.2d at 404; United States v. Martinez, 785 F.2d 663, 670 (9th Cir. 1986). Indeed, Lovasco itself makes clear (431 U.S. at 791-796) that continuation of an investigation, and the preparation of charges involving related crimes with an eye toward joining related offenses and offenders, present perfectly legitimate reasons for delaying the filing of an indictment. In this case, as both courts below correctly found (Pet. App. 10a, 22a-23a), the government delayed the filing of the indictment solely for such investigative and similar legitimate purposes.

The racketeering investigation was complex and time-consuming, the resulting indictment 90 pages long. The government investigators had to gather and present to the grand jury evidence concerning more than 80 offenses involving 25 defendants. Considerable effort and time was needed to frame, and obtain Department of Justice approval for, an indictment involving all of the related criminal transactions. The government justifiably sought to prosecute all of the Ghost Shadow gang members together, as they and their criminal activities were closely related. In connection with the Chui murder, moreover, which was the most serious of the racketeering acts charged against petitioner, the government did not obtain the most critical piece of evidence against petitioner until December 13. When petitioner turned 21 the following day, the government still had much work to do in completing the investigation and preparing the Ghost Shadows prosecution.⁴ In

4/ Although petitioner asserts (Pet. 17-18) that the government could have taken steps to complete its investigation prior to the date that he turned 21, he does not quarrel with, indeed he appears to accept (Pet. 18-19), the district court's finding (Pet. App. 23a) that such steps would have "charged the entire structure of the indictment," required filing of separate indictments against various defendants and sealing of some of (cont'd on next page)

these circumstances, petitioner clearly would not be entitled to relief under Lovasco or under the more relaxed approach to applying the Lovasco standard.⁵

In addition to the fact that the result in this case would remain the same regardless of which of the court of appeals' approaches is applied, further review of the decision is unwarranted because the lower courts' differences do not create a conflict that requires resolution by this Court. As the continued existence of conflicting intra-circuit pronouncements in the Fifth, Seventh, and Eighth Circuits illustrates (see note 3, supra), the difference between the approaches to Lovasco have so far been far more theoretical than real. Indeed, among the decisions cited by petitioner, in not one that applied a more relaxed standard has the defendant prevailed. See United States v. Automated Medical Laboratories, Inc., supra; United States v. Moran, supra; United States v. Williams, 738 F.2d 172 (7th Cir. 1984); United States v. Taylor, supra; United States v. Solomon, supra; United States v. Townley, supra. Moreover, in none of the decisions that required intentional seeking of tactical advantage would any of the more relaxed approaches have led to a different result. See United States v. Lebron-Gonzalez, supra (government's key witness did not cooperate until shortly before indictment); United States v. Caporale, supra (delay caused by complexity and by fact that years passed before chief government

those indictments, and imposed various other burdens on the government. Petitioner's speculations concerning the timing of the government's cooperation agreement with the key witness against him call for precisely the kind of intrusive judicial inquiry and judicial second-guessing of prosecutorial judgments that this Court rejected in Lovasco. See 431 U.S. at 790, 791-796; see also id. at 793 n.14 (courts should not "trace the day-to-day progress of each investigation").

5/ When the indictment was not filed by his 21st birthday, petitioner was concededly prejudiced in that he lost the chance to be treated under the Juvenile Delinquency Act. We note, however, that even if petitioner had been indicted soon enough to make him eligible for treatment under the Act, he might well have been transferred to district court and prosecuted as an adult (18 U.S.C. 5302; Pet. App. 5a-6a n.1). Moreover, petitioner has not claimed that he was in any way prejudiced in his ability to prepare a defense or to meet the government's case against him.

witness began to cooperate; also, no tactical advantage was in fact obtained); United States v. Jenkins, supra (no prejudice shown); United States v. Watkins, supra (no prejudice or improper purpose shown); United States v. Scott, supra (no prejudice shown). All of the courts of appeals properly recognize the wide range of legitimate reasons for delaying the filing of an indictment. See United States v. Martinez, 785 F.2d at 670 ("prosecutors are entitled to great leeway in their reasons for investigative delay").

In these circumstances, there is no reason for this Court to decide which of the several different lower court formulations, or what other possible formulation, best states the standard for obtaining relief from pre-indictment delay. We believe, following Gouveia, that the proper standard generally requires a showing not only of prejudice but also of an intentional seeking of tactical advantage by the government.^{6/} More relaxed standards threaten the sort of judicial interference with prosecutorial decisionmaking that this Court in Lovasco correctly held to be inappropriate. But until cases arise in which the different approaches followed by the courts of appeals produce significant differences in result, as they have not so far done and as they would not do in this case, intervention by this Court would be premature.

^{6/} In Lovasco, we stated that "[a] due process violation might also be made out upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense" (431 U.S. at 795 n.17 (quoting Brief for the United States)).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

THOMAS E. BOOTH
Attorney

NOVEMBER 1987